ST 05-0106-GIL 10/20/2005 MISCELLANEOUS

The transfer of assets in a merger of two limited liability companies is not subject to either Retailers' Occupation Tax or Use Tax liability. See 805 ILCS 180/37-30. (This is a GIL.)

October 20, 2005

Dear Xxxxx:

This letter is in response to your letter dated January 20, 2005, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

> We hereby request a letter ruling as to the retailer's occupation and use tax consequences of the following proposed transaction.
>
> **I. FACTS**
>
> The taxpayer, Company A, an Illinois limited liability company, proposes a merger with Company B, a STATE limited liability company. Both Company A and Company B are owned by individual taxpayer Member 1, who is an Illinois resident. Company B is the owner of an aircraft with a FMV of Five million dollars ($5,000,000) and a book value of Four million dollars ($4,000,000). The aircraft was purchased in the state of Kansas however no sales tax was due as a result of a 'flyaway' exemption provided by Kansas Statute 79-3606(k). Company B is engaged in the business of renting said aircraft, and obtained a resale exemption under the STATE Revised Statutes 372.050, so that sales tax was not due in STATE. Company A has entered an aircraft rental agreement with Company B. Company A and Company B agree to a statutory merger pursuant to which Company B merges into the surviving Company A, and Company B ceases to exist. The members of Company B will be given membership units in Company A, and the aircraft and related items owned by Company B will be transferred to Company A.
>
> **II. DETERMINATIONS**

The taxpayer hereby requests a determination as to the following alternatives:

1) Taxpayer will be allowed to complete the transfer of property exempt from retailer's occupation tax and use tax because the transfer of property is the result of a merger of the entire operation of a business and thus is a transfer by operation of law.

2) Taxpayer will be allowed to complete the transfer of property exempt from retailer's occupation tax and use tax because the transfer occurs as part of an isolated sale and is therefore exempt.

III. DISCUSSION

1) The taxpayer seeks a determination that the transfer of property as a result of the merger of Company B into Company A is not subject to retailer's occupation and use taxation because the transfers were by operation of law. Company B and Company A were merged pursuant to Illinois Statute 805 ILCS 180/37-20*.* In this merger, the operations of Company B ceased to exist and the assets and liabilities of Company B were transferred to Company A. Under Illinois Statute 805 ILCS 180/37-30(a)(2), the transfer of the tangible property was not the result of a voluntary choice of the parties, but instead occurred as an operation of law resulting from the merger of the two companies.[1] As a transfer by operation of law, the transfer was neither a sale at retail under the provisions of 35 ILCS 120/2, and therefore not subject to retailer's occupation tax, nor a transfer subject to use tax under 35 ILCS 105/3.

2) The taxpayer seeks a determination that the transfer of the aircraft and its related items, due to the merger of the two companies, is exempt from retailer's occupation and use tax as a result of the exemption for an isolated and occasional sale. The Illinois Compiled Statutes provide that retailer's occupation tax is imposed on 'persons engaged in the business of selling at retail tangible personal property' (35 ILCS 120/2), and that '(a) tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer' (35 ILCS 105/3). However, the Illinois Compiled Statutes recognize exemptions from both the retailer's occupation tax and the use tax for isolated and occasional sales:

'The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail, or a sale through a bulk vending machine, does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act'……(35 ILCS 120/1) [retailer's occupation tax]

'The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail or a sale through a bulk vending machine does not make such person a retailer hereunder.'…...(35 ILCS 105/2) [use tax]

In the above situation, the transfer of property occurs as a consequence of the merger of Company B into Company A. The transaction results in the effective sale of Company B as an operating enterprise. By the very nature of this transaction, Company B is a 'person who does not hold himself out as being engaged in selling tangible personal property at retail', since the person being offered for the isolated sale is Company B itself. Upon the completion of the 'isolated sale' Company B will cease to exist, and

Company A alone will survive. Therefore, the transfer of property occurs as the result of an isolated and occasional sale and is exempt from the retailer's occupation tax and the use tax.

We hereby request that the Department provide a determination letter regarding the proposed transaction for the issue outlined above.

DEPARTMENT'S RESPONSE:

For information regarding this issue, please refer to the Department's general information response in ST-03-0058-GIL. You may reference the Department's "Sunshine Letter Rulings" on the Department's internet website under the heading of "Laws/Regs/Rulings."

For additional information regarding the transfer of aircraft in a non-retail situation please refer to the Aircraft Use Tax at 86 Ill. Adm. Code 152.101.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

EEB:msk

[1] In US v Seattle-First National Bank 321 U.S. 583, a case involving the consolidation of a state bank with a national banking association, the United States Supreme Court stated that 'We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be 'wholly by operation of law'.'